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In the Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1486, authorizes operators of cable television systems to prohibit indecent programming on channels set aside for lease by unaffiliated third parties (leased access channels), as well as channels reserved for public, educational or governmental (PEG) use. In addition, with respect to the leased access channels, if a cable operator chooses not to prohibit indecent programming on those channels, the operator must place such programming on a separate channel and block access to that channel until the cable subscriber requests access in writing. The questions presented are:

1. Whether Congress violates the First Amendment by permitting—but not requiring or encouraging—cable operators to prohibit indecent programming on their leased access or PEG channels.

2. Whether Congress violates the First Amendment by requiring cable operators who choose not to ban indecent programming on their leased access channels to segregate and block such programming, permitting access only upon a subscriber's written request.

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OPINIONS BELOW

The opinion of the court of appeals *in banc* (Pet. App. 2a-88a)[1] is reported at 56 F.3d 105. The opinion of the panel (Pet. App. 90a-125a) is reported at 10 F.3d 812. The Federal Communications Commission's First Report and Order (Pet. App. 128a-177a) is reported at

[1] References to "Pet. App." are to the Appendix to the Petition in No. 95-124.

8 FCC Rcd 998, and its Second Report and Order (Pet. App. 178a-202a) is reported at 8 FCC Rcd 2638.

JURISDICTION

The judgment of the court of appeals *in banc* was entered on June 6, 1995. The petitions for a writ of certiorari were filed on July 21, 1995, and August 9, 1995, respectively, and were granted on November 13, 1995 (116 S. Ct. 471). The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See 28 U.S.C. 2350(a).

STATEMENT

1. Federal law requires operators of cable television systems with more than 36 channels to set aside a certain number of channels for commercial lease by unaffiliated third parties (leased access channels), see 47 U.S.C. 532(b) (1988 & Supp. V 1993), and permits local franchise authorities to require operators to set aside certain channels for "public, educational, or governmental [PEG] use." 47 U.S.C. 531 (1988).

When Congress first enacted those provisions in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984 Cable Act), it forbade cable operators from exercising editorial control over their PEG and leased access channels, see 47 U.S.C. 531(e), 532(c)(2) (1988), and provided that cable operators "shall not incur any * * * liability" under federal, state, and local obscenity laws for programs carried on such channels, 47 U.S.C. 558 (1988). As one method of addressing the problem of indecent cable programming, however, the 1984 Act required cable operators to "s[ell] or lease" lockboxes to subscribers who request them. 47 U.S.C. 544(d)(2) (1988). A lockbox is a device "by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. 544(d)(2)(A) (1988).

Congress revisited the question of indecent cable programming, particularly on leased access and PEG channels, as part of its comprehensive overhaul of cable television regulation in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act). "The problem," Congress was informed, "is that cable companies are required by law to carry, on leased access channels, any and every program that comes along," including programs that include a wide variety of highly indecent material. 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms) (describing leased access program in New York that "depicts men and women stripping completely nude," another featuring people performing oral sex, and a channel with advertisements promoting "incest, bestiality, [and] even rape"). See also *id.* at S648 (statement of Sen. Thurmond) (noting leased access channel with "numerous sex shows and X-rated previews of hard-core homosexual films" as well as channels with advertisements for phone lines letting listeners eavesdrop on acts of incest). Members of Congress were concerned that "early and sustained exposure" to such material can cause "significant physical, psychological, and social damage to a child." *Id.* at S649 (statement of Sen. Coats).

To protect against the harm to children and to return a measure of control to cable operators on leased access channels, Congress adopted Section 10(a) of the 1992 Cable Act, 106 Stat. 1486, which permits cable operators to enforce "a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 47 U.S.C. 532(h) (Supp. V 1993). The provision's sponsor, Senator Helms, emphasized that by giving "the cable operator the right to reject such material," Section 10(a) "doe[s] not require

the cable operators to do anything." 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992).

Congress also adopted a provision requiring the Commission to promulgate regulations to limit the access of children to indecent programming on leased access channels. Section 10(b) of the 1992 Cable Act, 106 Stat. 1486, requires cable operators who permit the carriage of indecent programming on leased access channels to place the programming on a separate channel and to block a subscriber's access to that channel until the subscriber requests in writing that the channel be unblocked. See 47 U.S.C. 532(j) (Supp. V 1993). As Congress was informed, the segregation and blocking requirement was "precisely the same method" that it had used and the courts had approved to block access to indecent telephone messages (so-called "dial-a-porn"). 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). See *Dial Information Servs. Corp.* v. *Thornburgh*, 938 F.2d 1535, 1543 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 878 (9th Cir. 1991).

Moreover, the problem of indecent programming, Congress found, was not limited to leased access channels. PEG channels were also being used, for example, "to basically solicit prostitution through easily discernible shams such as escort services, fantasy parties, where live participants, through two-way conversation through the telephone, are soliciting illegal activities." 138 Cong. Rec. S649 (daily ed. Jan. 30, 1992) (statement of Sen. Fowler). See also *id.* at S650 (statement of Sen. Wirth) (agreeing that public access "has * * * been abused"). Congress therefore adopted Section 10(c) of the 1992 Cable Act, 106 Stat. 1486, which requires the Commission to enable cable operators to prohibit the use of PEG channels "for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." 47 U.S.C. 531 note (Supp. V 1993). In this way, Congress permitted cable operators to "police their own systems, which they cannot

do now." 138 Cong. Rec. S650 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth). The PEG provision differs from the leased access provision, however, in that it contains no requirement that operators segregate and block any indecent programming that they choose to carry.

Finally, Congress eliminated the immunity of cable operators for carrying obscene programming on their access channels, by specifying that operators would be free from liability for programming on leased access and PEG channels "unless the program involves obscene material." 1992 Cable Act, § 10(d), 106 Stat. 1486, 47 U.S.C. 558 (Supp. V 1993). The provision's sponsor explained that "it was never the intent of the Congress * * * to provide a safe harbor for obscenity." 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).

2. The Commission adopted final regulations implementing the statutory provisions governing leased access channels in its *First Report and Order*, 8 FCC Rcd 998 (Pet. App. 128a-177a). In doing so, the Commission rejected constitutional challenges to Section 10(a)'s authorization to cable operators to prohibit indecent programming on leased access channels. Pet. App. 140a. The Commission also made clear that, consistent with the definition contained in Section 10(a) of the statute (itself based on the Commission's long-standing formulation), indecent programming subject to blocking consists of "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." 47 C.F.R. 76.701(g); Pet. App. 148a-149a.

The Commission issued regulations concerning the carriage of indecent programming on PEG channels in its *Second Report and Order*, 8 FCC Rcd 2638 (Pet. App. 178a-202a). The agency again rejected the contention that, by permitting operators to choose to prohibit certain programming on PEG channels, the statute violated

the First Amendment. Pet. App. 181a-183a. The Commission also construed the statute's coverage of programming containing "sexually explicit conduct" to mean that the programming must be "indecent." *Id.* at 186a-187a. The Commission found such a construction to be reasonable, "given the purposes underlying section 10 as a whole and its legislative history, namely, reducing the exposure of viewers, especially children, to 'indecent' programming on cable access channels." *Id.* at 187a.

3. Petitioners, a number of cable programmers and organizations of listeners and viewers, filed petitions for review of the Commission's orders in the court of appeals, contending that Section 10 and its implementing regulations violate their rights to free speech under the First Amendment.

a. After staying the regulations pending review, a panel of the court invalidated Sections 10(a) and 10(c). Pet. App. 111a. The panel held that, because those provisions permitted cable operators to ban indecent leased access and PEG programming, the operators' decisions to do so should be attributed to the federal government as "state action." *Id.* at 108a. The panel remanded the issue of the constitutionality of Section 10(b)'s segregation and blocking scheme for leased access channels to the Commission for further consideration in light of its invalidation of Sections 10(a) and 10(c). *Id.* at 122a-125a.

b. The court of appeals subsequently vacated the panel opinion, reheard the case *in banc*, and issued a judgment upholding Section 10 and the regulations. Pet. App. 2a-89a. The full court held that the decisions by cable operators to prohibit indecent leased access or PEG programming are not "state action" to which the First Amendment applies. *Id.* at 31a. The court emphasized that the statute does not "command" cable operators to prohibit indecent programming. *Id.* at 12a. Instead, the court explained, the statute "gives them a choice" (*id.* at 18a); operators "may carry indecent programs on their access channels, or they may not" (*id.* at 12a).

As the court explained, that is the same choice that operators have with respect to all other cable channels on their systems. *Id.* at 14a.

The court also concluded that the statute does not provide such "significant encouragement" to the decision by any cable operator to ban indecent access programming that "state action must be found." Pet. App. 19a. As the court recognized, "'[m]ere approval of or acquiescence in the initiatives of a private party' * * * cannot 'justify holding the State responsible for those initiatives.'" *Id.* at 22a (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982)). The court also found that it would be inappropriate to assume that the costs associated with Section 10(b)'s segregation and blocking scheme would cause cable operators to ban indecency from their leased access channels. Pet. App. 23a-25a. As the court explained, "[n]othing in section 10 specifies that [such costs] * * * must be borne by cable operators," and the FCC "has determined to take up this and related issues in its cable rate regulation proceeding upon the final resolution of this litigation." *Id.* at 24a.

In addition, the court determined, any effect that Section 10(d)'s removal of immunity for the carriage of obscene programming would have on an operator's programming decision would not support attribution of the operator's decision to ban indecent programming to the government. Pet. App. 26a-27a. The court observed that because obscene cable programming is constitutionally unprotected, Congress has the power to ban such programming altogether. The court noted that "Section 10(d) thus imposes on cable operators the same liability for obscene access programming that operators long have had with respect to other programming on channels they control." *Id.* at 27a. If "a cable operator takes this into account in deciding which programs to carry—on any channel," that fact could not "convert its refusal to carry indecent programming into state action." *Ibid.*

The court determined, moreover, that leased access and PEG channels are not "public forums" for First Amendment purposes, since they are neither owned by the government, Pet. App. 29a, nor "so dedicated to the public that the First Amendment confers a right on the users to be free from any control by the owner of the cable system," *id.* at 31a. The court found that the 1992 Cable Act's leased access and PEG obligations are akin to common carrier requirements, which have never been thought to transform a private entity's decisions into those of the government. *Ibid.*

The court held that Section 10(b)'s segregation and blocking scheme constitutes state action, but is the least restrictive means of accommodating "two competing interests: the interest in limiting children's exposure to indecency and the interest of adults in having access to such material." Pet. App. 33a. The voluntary use of lockboxes would not be an effective alternative, the court determined, since it would present cable viewers with "two, equally unacceptable options." *Id.* at 35a. Because such channels are controlled by no single editor, viewers either would have to "continually activate and deactivate" the lockboxes, "inevitably risking a slip up or a lapse that would expose their children to indecency," or they would have to "install lockboxes permanently, thereby giving up leased access programming altogether." *Ibid.*

The court rejected petitioners' arguments that Section 10 unconstitutionally discriminates against leased access programming because it does not impose a similar segregation and blocking scheme on PEG or commercial cable channels. The court explained that leased access channels are unlike commercial channels, not only because no single editor is responsible for what is shown on leased access channels, but because indecency on other channels is generally shown only upon request and for a premium payment. Pet. App. 40a-41a. The court acknowledged that PEG channels "are comparable" to leased access channels in this respect, but found that PEG

channels "did not pose dangers on the order of magnitude of those identified on leased access channels." *Id.* at 40a.

Finally, the court concluded, the statute's indecency standard is not impermissibly vague, noting that the standard tracks the Commission's generic definition of indecency, which this Court reviewed and upheld in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). Pet. App. 42a-43a.[2]

SUMMARY OF ARGUMENT

I. Cable operators "own the physical cable network and transmit the cable signal to the viewer." *Turner Broadcasting Sys., Inc.* v. *FCC*, 114 S. Ct. 2445, 2452 (1994). By virtue of its ownership interest, a cable operator ordinarily exerts editorial control over the programming provided on its system; it chooses which programs it will transmit, and which it will not. See *id.* at 2456; *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

In requiring that certain channels be set aside for leased access programming and permitting cable operators and local franchise authorities to agree to reserve other channels for PEG programming, Congress generally withdrew the operators' editorial control over those portions of their systems. See 47 U.S.C. 531(e), 532(c)(2) (1988). By doing so, however, Congress removed the ability of operators to determine whether or not to carry indecent programming on their systems. Sections 10(a) and 10(c) of the 1992 Cable Act simply restore that abil-

[2] Only Judges Wald and Tatel dissented in full from the *in banc* decision. Pet. App. 44a-76a. Judge Edwards stated that in his view Sections 10(a) and 10(b), read in tandem, impose an unconstitutional burden on speech, but he sided with the majority as to Section 10(c), concluding that the provision "merely returns some editorial control to cable operators," which is "not the least bit objectionable." *Id.* at 78a. Judge Rogers agreed with the dissenters only with regard to Section 10(b); after severing that provision, she would have upheld the rest of the statute. *Id.* at 88a.

ity by permitting operators, if they so choose, to prohibit indecent programming on their leased access and PEG channels.

Sections 10(a) and 10(c) do not provide governmental encouragement to cable operators not to broadcast indecent programming, let alone so significantly encourage them not to do so that the operators' decisions should be attributed to the government. Sections 10(a) and 10(c) leave the decision whether or not to carry indecent access programming entirely up to each cable operator; the statute neither requires operators to ban such programming nor provides them with significant incentives to do so. The fact that Sections 10(a) and 10(c), like many other federal statutes, preempt state laws to the contrary does not require attribution of the cable operators' decision to the government under the state action doctrine. Nor are private cable operators bound by the public forum doctrine to carry whatever programming is submitted to them for dissemination on access channels.

Although the programming decisions of private cable operators are not properly attributed to the government, Congress's enactment of a law giving them that choice must be consistent with the First Amendment. That law, however, does not restrict the right of the public to engage in free expression. Instead, it permits private cable operators to exercise their own expressive rights by refusing to serve as disseminators of indecent programming. The government's allowance of that freedom of private choice, in the context of indecent speech, is both reasonable and viewpoint-neutral. Accordingly, Sections 10(a) and 10(c) are consistent with the First Amendment.

II. The 1992 Cable Act also requires, through Section 10(b), that cable operators who carry indecent programming on leased access channels must segregate and block such programming on a separate channel, with access available upon a subscriber's written request. 47 U.S.C. 532(j) (Supp. V 1993). Section 10(b) constitutes state action.

The First Amendment does not require that regulations of indecency on television be subject to the strictest standard of review. Like radio broadcasting, which this Court addressed in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), television is a uniquely pervasive presence in American homes, and its offerings are uniquely accessible to children. Therefore, the conclusion in *Pacifica* that a more flexible standard of review applies to regulation of indecency broadcast over the radio is equally appropriate to regulation of indecency on cable television.

In any event, Section 10(b) would satisfy even strict scrutiny, because it constitutes the least restrictive means of realizing the federal government's "compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). As Congress was informed, programming carried on access channels included footage of sexual intercourse, advertisements for dial-a-porn services, "escort" solicitations, and other sexually graphic material. See, *e.g.*, 138 Cong. Rec. S646-S648 (daily ed. Jan. 30, 1992). Under the 1984 Cable Act, children had unimpeded access to such programming unless and until their parents discovered that their family televisions harbored indecent images that they never ordered, spent the time and money to buy a "lockbox" from their cable operators, and accurately installed and programmed the lockbox to screen what their children could view. Recognizing that inertia or lack of knowledge would keep many parents from taking those steps, Congress found that a segregation and blocking requirement was as a practical matter necessary to limit the access of children to indecent programming.

III. Finally, Congress's limitation of segregation and blocking to leased access channels does not render Section 10(b) impermissibly underinclusive. As the court of appeals determined, Congress reasonably found that the problem of indecency was more severe on leased access than on other channels. Nor is Section 10 unconstitutionally vague because it applies to "programming

that describes or depicts sexual or excretory activities or organs in a patently offensive manner." 47 C.F.R. 76.701(g). As this Court implicitly determined in *Pacifica*, that formulation, as it has been applied by the Commission, is not "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338-1339 (D.C. Cir. 1988) (internal quotation marks omitted).

ARGUMENT

I. SECTIONS 10(a) AND 10(c) OF THE 1992 CABLE ACT, WHICH PERMIT CABLE OPERATORS TO PROHIBIT INDECENT PROGRAMMING ON LEASED ACCESS AND PEG CHANNELS, DO NOT VIOLATE THE FIRST AMENDMENT

In seeking to invalidate Sections 10(a) and 10(c), petitioners make two distinct arguments. First, they argue (DAETC Br. i (Questions Presented), 14-15 & n.17, Alliance Br. 29) that those provisions are unconstitutional because private cable operators will "censor" the speech of access programmers. Although they claim otherwise (see DAETC Br. 19, Alliance Br. 22), that argument amounts to a mistaken claim that private cable operators are state actors when they make individual programming decisions. The action of private operators in choosing whether to prohibit indecent programming on access channels on their own systems is not properly attributable to the federal government.

Second, petitioners argue (DAETC Br. 19-21; Alliance Br. 20-22) that, because they are challenging a statute enacted by Congress, state action must be present. The enactment and governmental implementation of the statute are undoubtedly state action. Such action is not, however, "censorship." Instead, it is a grant of permission to private actors to make a choice regarding whether to transmit indecent material over their cable channels. Because the First Amendment allows the government to grant such permission, the statute is constitutional.

A. The 1992 Cable Act Does Not So Significantly Encourage Cable Operators To Prohibit Indecent Programming On Access Channels That Their Decision To Do So Should Be Attributed To The Government

By its terms, Section 10(a) of the 1992 Cable Act "permit[s]" cable operators to enforce a written and published policy of prohibiting indecent programming on leased access channels. 47 U.S.C. 532(h) (Supp. V 1993). It does not require them to do so. Section 10(c) of the 1992 Cable Act similarly requires the Commission to "enable" cable operators to prohibit the use of PEG channels for indecent programming, but it does not mandate that cable operators forbid such programming. See 47 U.S.C. 531 note (Supp. V 1993). Thus, as the court of appeals recognized, "[r]ather than coerce cable operators, section 10 gives them a choice." Pet. App. 18a. "Cable operators may carry indecent programs on their access channels, or they may not." *Id.* at 12a.

A governmental entity "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 546 (1987) (quoting *Blum*, 457 U.S. at 1004). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient." *Blum*, 457 U.S. at 1004. Accord *San Francisco Arts & Athletics*, 483 U.S. at 547. Because nothing in Section 10 compels cable operators to prohibit indecent programming on leased access or PEG channels or significantly encourages operators to do so, their private choice is not attributable to the government.

1. Petitioners contend that the statute significantly encourages operators to ban indecent access programming

because Members of Congress, such as Senator Helms, voiced their expectation that the statute would "put an end to the kind of things going on in New York and elsewhere" on access channels. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992); see Alliance Br. 28-29. As the court of appeals recognized (Pet. App. 21a-22a), the fact that individual Members of Congress may have expressed hope that operators would prohibit indecent programming on their access channels is of little relevance. Such statements impose no legal duty on cable operators, and may not even come to their attention. The question, instead, is whether *the statute* coerces or otherwise significantly encourages operators to prohibit such programming. See *Blum*, 457 U.S. at 1004-1005. If it does not, decisions by cable operators to prohibit indecent programming cannot be attributed to the government, whatever the statements of individual legislators.

In any event, Senator Helms' statement was made not with regard to Section 10(a) or Section 10(c), but with regard to Section 10(*d*), which removed cable operators' immunity for obscene programming, and was meant to emphasize that federal law would no longer provide a "safe harbor for obscenity" on access channels. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992). The statement has no relevance whatever to Senator Helms' separate discussion of Section 10(a), which, he emphasized, "does not require cable operators to do anything." *Id.* at S646.[3] Other supporters of Sections 10(a) and 10(c) also understood and confirmed the limited effect of those provisions. For example, Senator Thurmond observed that Section 10(a) "gives cable operators the right to reject sexually explicit programming on leased * * * access

[3] Senator Helms underscored the voluntariness of the cable operator's decision in a colloquy with Senator Inouye, the Democratic manager of the bill. Senator Inouye asked: "The action proposed in your amendment is not mandatory, is it?" 138 Cong. Rec. S649 (daily ed. Jan. 30, 1992). To which Senator Helms responded: "That is correct." *Ibid.*

channels," but that operators could "choose to accept such programming." *Id.* at S648. Senator Fowler, who introduced Section 10(c) on the Senate floor, explained that Section 10(c) "would *empower* cable operators to prohibit sexually explicit conduct * * * carried through the so-called public access channels." *Id.* at S649 (emphasis added). And Senator Wirth similarly emphasized that Section 10(c) would "give a very clear signal to the cable companies that, in fact, they can police their own systems, which they cannot do now." *Id.* at S650. Those statements by the principal supporters of Sections 10(a) and 10(c) reflect an intent to leave it entirely up to cable operators to decide whether or not to ban indecent access programming.

2. The Alliance petitioners contend (Br. 29-30) that the 1992 Cable Act encourages cable operators to prohibit indecent programming on their leased access and PEG channels, focusing on Section 10(d)'s removal of operators' immunity for the carriage of access programming that "involves obscene material." 47 U.S.C. 558 (Supp. V 1993). It is well settled, however, that the government may prohibit obscene speech, since such speech falls outside the First Amendment.[4] See, *e.g.*, *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 124 (1989). The fact that cable operators are now subject to such prohibitions with respect to their access channels—as they previously were with respect to all other channels they operate—does not provide a special incentive to operators to ban indecent programming that is not obscene.

Alliance nonetheless maintains (Br. 30) that, in order to avoid liability for carrying obscene speech, cable operators are likely to "take the safe route and simply ban all materials that access programmers cannot affirmatively certify to be decent." But "[s]ome self-censorship is an

[4] The FCC has made clear that the statutory phrase removes operator immunity only for material that "is unprotected by the first amendment." Pet. App. 152a n.40.

inevitable result of all obscenity laws." *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 n.6 (9th Cir. 1987), cert. denied, 485 U.S. 1029 (1988). See *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 60 (1989). Private parties make private decisions against a backdrop of criminal laws and obscenity statutes every day. As the court of appeals recognized (Pet. App. 27a), the fact that they take such laws into account does not transform their decisions into those of the government. *Carlin*, 827 F.2d at 1297 n.6.

3. Alliance also alleges (Br. 29) that cable operators have an incentive under the statute to ban rather than block indecent access programming because "blocked channels are technically cumbersome and financially burdensome."

As the court of appeals recognized, a blocked channel is not "technically * * * cumbersome" to establish; "[e]very cable system that has premium or pay-per-view channels already is constantly blocking and unblocking them and thus has the technical capability to perform this task." Pet. App. 24a, 25a. For those systems that do not have such channels, the Commission's rules permit the operator to achieve the same result by installing lockboxes that exclude the blocked channel, while retaining the key or numeric code until the customer requests unblocking. *Id.* at 25a (citing *id.* at 162a n.46).[5] In any event, even if there were some cable systems for which the blocking requirement posed technical difficulties, that fact cannot assist petitioners in this facial, pre-enforcement challenge to the statute as a whole. See *Reno* v. *Flores*, 113 S. Ct. 1439, 1446 (1993).

Any financial burdens relating to the establishment of a separate blocked channel are irrelevant to petitioners'

[5] Operators also are not required to block a separate channel for the entire day if only a few hours are needed to carry indecent programming. Under the Commission's rules, the channel designated for the carriage of indecent leased access programming need "be blocked only during those time periods that indecent leased access programming is being shown." Pet. App. 163a.

facial challenge to Section 10's constitutionality. As the court of appeals recognized, the statute does not require that costs associated with segregation and blocking of indecent programming on leased access channels be borne by the cable operator, and the Commission has yet to consider the matter. Pet. App. 24a, 146a n.29.

The record also suggests that carrying indecent programming provides cable operators with financial benefits that offset whatever burden might be involved in implementing Section 10(b)'s blocking requirements. Indecent programming is often highly popular, as petitioners are aware. See Alliance Br. 43 n.33 (noting that by mid-1992, the Playboy Channel had generated more than $50 million" in revenues for cable operators). Indeed, Time Warner—a large cable operator that "owns and operates cable systems in approximately 1,000 franchise areas throughout the United States," J.A. 251—successfully suggested to the Commission that a cable operator should be allowed "to provide an additional blocked leased access channel for indecent programming if the first channel becomes full." See Pet. App. 163a; J.A. 255-256. See also J.A. 251-252 (noting that leased access channel in New York City is "usually fully booked with sexually explicit programming" every day "from 10:00 p.m. to 4:30 a.m." and that "the demand for additional time remains high").

Nor is there reason to believe that cable operators' "general hostility" towards access programmers (see Alliance Br. 29) will lead operators to ban indecent programming on their access channels. An operator's decision to prohibit indecent programming on access channels does not generally lessen its obligation to provide such channels; it simply changes the mix of its access programming. Thus, the fact that operators may be generally reluctant to provide access capacity does not suggest that, once obligated to provide a set number of access channels, see 47 U.S.C. 532(b) (1988 & Supp. V 1993), they will be more or less likely to permit indecent access programming.

4. a. Relying on *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), petitioners contend (Alliance Br. 24-27; DAETC Br. 23-24) that the actions of the cable operators in deciding whether to ban indecent programming from their access channels should be attributed to the federal government because Section 10(a) and 10(c) preempt contrary state law.

Hanson involved a provision of the Railway Labor Act authorizing interstate railroads to enter into union shop agreements "[n]otwithstanding any * * * law * * * of any State." 45 U.S.C. 152, Eleventh.[6] Appellees, non-union employees of a railroad that had entered into a union shop agreement, sought to enjoin the application and enforcement of the agreement under state law. *Hanson*, 351 U.S. at 228. The Supreme Court of Nebraska held that the union shop agreement violated the First and Fifth Amendments, and that therefore Nebraska law, which prohibited the agreement, was controlling. *Id.* at 230. On appeal, this Court concluded that the federal statute constituted state action to which the First and Fifth Amendments applied. *Id.* at 232.

Hanson provides no support to petitioners' argument here. First, the preemptive effects of Sections 10(a) and 10(c) are not appropriately resolved in this facial challenge to Section 10. To prevail, petitioners "must establish that no set of circumstances exists under which the [statute] would be valid." *Reno* v. *Flores*, 113 S. Ct. at 1446. Yet petitioners do not—and could not—assert that every cable operator is required by state or local law or by a franchise agreement to permit indecency on access channels. Alliance cites (Br. 26 n.18) only two jurisdictions (New York and the Virgin Islands) that divest cable operators of editorial control over their leased and public access channels as a matter of local law. And

[6] A union shop agreement provides that "an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 217 n.10 (1977).

it is not uncommon for local access regulations to prohibit indecent programming, notwithstanding the fact that the 1984 Cable Act would appear to have prohibited such requirements. See Comment, *Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response*, 38 DePaul L. Rev. 1051, 1084 n.225 (1989) (citing regulations). Moreover, insofar as ordinances or contracts preclude cable operators from exercising editorial control over access channels, those ordinances and contracts may well have been influenced by the like requirement in the 1984 Cable Act itself; by preempting such provisions, Congress has to a great extent returned the parties to the position they would have occupied had the 1984 Cable Act itself been limited.

In any event, even if federal preemption in some circumstances can make the actions of a private party attributable to the federal government, that surely is not the case whenever federal law preempts state law. For example, the federal allocation of broadcast frequencies no doubt preempts any state effort to accomplish the same end; that fact does not, however, convert the editorial choices of federal broadcast licensees into state action. Cf. *CBS, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). Similarly, the Equal Access Act, 20 U.S.C. 4071(a)—which requires the States in some circumstances to permit private religious activities on public school property, see *Board of Educ.* v. *Mergens*, 496 U.S. 226 (1990)—does not somehow transform a private religious group's doctrinal instruction into proselytization by the government itself in violation of the Establishment Clause. See *Garnett* v. *Renton School Dist. No. 403*, 987 F.2d 641, 646 (9th Cir.) (discussing Act's preemptive effect), cert. denied, 114 S. Ct. 72 (1993). Accordingly, insofar as petitioners seek to rely on the preemptive effects of Sections 10(a) and 10(c), they should raise that issue as did the plaintiffs in *Hanson*, in an as-applied challenge to the statute based on alleged rights that they have under a particular state law.

Second, although we have previously argued that the holding of *Hanson* should not be extended to areas outside the context in which it was decided,[7] for present purposes it suffices that the holding in *Hanson* is entirely consistent with our position in this case. The holding of *Hanson* was that a federal statute permitting railroads and unions to negotiate union shop agreements that would be banned by contrary state law is government action and is constitutional. Similarly, although the conduct of cable operators in prohibiting indecent programming under Sections 10(a) and 10(c) is not properly attributable to the federal government, the statutory grant of permissive authority to cable operators to do so must be consistent with the First Amendment, and we argue below that it is. See pp. 24-28, *infra*. *Hanson* does not rest on the premise that a private employer's decision to enter into and enforce a union shop agreement is itself attributable to the government, and it therefore does not support petitioners' suggestion that, by analogy, Sections 10(a) and 10(c) convert the decisions of private cable operators to prohibit (or not to prohibit) indecent access programming into actions of the federal government. Private action is not attributable to the government merely because it is permitted by federal law. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164-166 (1978).

b. Contrary to petitioners' suggestion (Alliance Br. 28-31; DAETC Br. 24), this Court's decision in *Skinner*

[7] See Brief for the United States as Amicus Curiae at 24-30, *Communications Workers* v. *Beck*, 487 U.S. 735 (1988) (No. 86-637). This Court's cases that have discussed *Hanson* have not themselves had to address whether state action was present. *Abood* v. *Detroit Bd. of Educ.*, *supra*, involved public sector workers, and there was thus no state action issue in that case. 431 U.S. at 217-220. *Beck* involved a private-sector labor agreement, and the decision in that case turned on the interpretation of the National Labor Relations Act, not the Constitution. The state action issue accordingly did not arise. See 487 U.S. at 761 ("We need not decide whether the exercise of rights permitted, though not compelled, by [the Act] involves state action.").

v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), does not support their claim. In *Skinner*, the Court noted that, "[a]lthough the Fourth Amendment does not apply to a search or seizure * * * effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government." *Id.* at 614. The Court then examined whether a railroad that conducted drug tests authorized—but not required—by federal regulations could be "deemed an agent or instrument of the Government for Fourth Amendment purposes," and concluded that it could. *Ibid.*

The federal regulations in *Skinner* preempted state law or private agreements to the contrary, see 489 U.S. at 615, like the provisions at issue in this case. But the federal regulations in *Skinner* took two significant additional steps as well. First, the regulations in *Skinner* "confer[red] upon the [government] the right to receive certain biological samples and test results procured by railroads" in drug tests. *Ibid.* Because the government thus had the legal right to the fruits of the railroads' search, the situation was comparable to one in which a government agent participated in the search itself. Second, the regulations in *Skinner* provided that "[a]n employee who refuses to submit to the [drug] tests must be withdrawn from [certain job activities]." *Ibid.* They therefore inserted federal coercive force into the otherwise consensual transaction between railroad and employee.

The Court in *Skinner* explained that no single factor was dispositive; instead, "specific features of the regulations combine[d] to convince [the Court] that the Government did more than adopt a passive position toward the underlying private conduct." 489 U.S. at 615. Unlike the regulations in *Skinner*, Sections 10(a) and 10(c) do not provide the government with any service or benefit as a result of any private choices to prohibit (or not to prohibit) indecent access programming, and no coercive governmental power is employed to enforce those choices of private cable operators. Accordingly, the "spe-

cific features of the regulations" in this case demonstrate that the conduct of the cable operators is not attributable to the government.

5. Petitioners also seek support (Alliance Br. 32-35; see DAETC Pet. 20 n.11; New York City Br. 10-22) from their characterization of private cable systems as "public forums." As the court of appeals correctly discerned (see Pet. App. 28a), the public forum doctrine derives from efforts to address the "issue of when the First Amendment gives an individual or group the right to engage in expressive activity on *government* property." *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting) (emphasis added); see also *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 112 S. Ct. 2701, 2707 (1992).[8] The access channels in this case plainly are not government property—they "belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers." Pet. App. 29a.[9] In addi-

[8] The mere fact that "an instrumentality 'is used for the communication of ideas or information'" does not automatically make it a public forum, even when the instrumentality is publicly owned. *United States Postal Serv.* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981). A public forum for First Amendment purposes thus "is not, for instance, a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee." Pet. App. 28a. Nor was the advertising space made available on the public buses at issue in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), a public forum even though it was used for the communication of ideas. *Greenburgh Civic Ass'ns*, 453 U.S. at 130 n.6.

[9] Petitioners state that "this Court has expressly stated that public forum analysis may be applied to 'private property dedicated to public use.'" Alliance Br. 35 (quoting *Cornelius*, 473 U.S. at 801). But the Court in *Cornelius* cited no case law in support of that proposition, and the forum at issue in *Cornelius*—the Combined Federal Campaign—involved the use of government property by government employees. 473 U.S. at 790, 801. Thus, the forum clearly was not "private property dedicated to public use." Pet. App. 30a. And, as the court of appeals recognized (*id.* at 30a-31a), this Court, in declining to equate private shopping centers with public streets and parks, has characterized the dedication-of-private-property-to-public-use theory as "attenuated" and "by no means" constitutionally required. *Hudgens* v. *NLRB*, 424 U.S. 507, 519 (1976); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 569 (1972). While the First Amendment does not prohibit a legislative requirement that portions of such private property be made available in some circumstances for the exercise of free expression (*PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980)), that does not mean that the First Amendment itself imposes such a duty in the absence of a legislative requirement. Thus, the *PruneYard* situation may be what the Court had in mind in referring to "private property" in *Cornelius*.

tion, also unlike parks and streets and other genuine public forums, access channels are available only to those programmers unaffiliated with the cable operator, 47 U.S.C. 532(b) (1988 & Supp. V 1993), and PEG channels are set aside for "public, educational, or governmental" programming. 47 U.S.C. 531 (1988). Finally, at least with respect to leased access channels, cable operators charge a fee for their use.

As the Commission and the court of appeals concluded, access obligations are thus most accurately described as imposing a species of common carrier obligation on cable operators. Pet. App. 139a-140a; *id.* at 31a. See *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 701 (1979). And it is well settled in parallel situations that common carriers are not required to refrain from distinguishing between kinds of speech on the basis of content. See, *e.g.*, *Sable*, 492 U.S. at 133 (Scalia, J., concurring) ("[W]e do not hold that the Constitution requires public utilities to carry [indecent speech]."); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 877 (9th Cir. 1991) ("A telephone carrier * * * may ban 'adult entertainment' from its network."); *Carlin Communications*, 827 F.2d at 1297 (car-

rier generally under no constitutional restraints in its policy of banning all "adult" programming from its network).[10]

B. The First Amendment Permits The Government To Allow Cable Operators To Choose Whether Or Not To Allow Indecent Access Programming

Although an individual cable operator's decision to provide or withhold indecent programming on access channels cannot itself be attributed to Congress, state action does inhere in Congress's enactment of a statute giving operators such editorial freedom. Congress's authorization of private editorial choice in Sections 10(a) and 10(c) is constitutionally permissible. This Court has stated that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment," *Turner*, 114 S. Ct. at 2470; see 47 U.S.C. 521(4). To further that purpose, Congress has required cable operators to maintain access channels. Congress also, however, has a very substantial interest in protecting the expressive rights of cable operators who do not want to become purveyors of patently offensive programming regarding sexual and excretory matters. Sections 10(a) and 10(c) represent Congress's effort to achieve both purposes. The First Amendment does not require Congress to sacrifice either of them in order to pursue the other.

1. Sections 10(a) and 10(c) differ from most content-based regulations that are challenged on First Amendment grounds, because Sections 10(a) and 10(c) are

[10] The Alliance petitioners suggest (Br. 18-19, 31-32) that state action is present because the FCC has a continuing role in the implementation of Section 10 by resolving disputes concerning the definition of indecency under the statute. But the government's role in ensuring that a cable operator's editorial choices do not violate access programmers' statutory guarantees does not make the government the source of those choices. Analogously, the government's role in ensuring that employers do not hire or fire employees in violation of the civil rights laws does not somehow convert an employer's hiring or dismissal decisions into state action.

not restrictions on the right of the public to engage in free expression. Instead, they permit private participants in the marketplace of ideas to avoid serving as conduits for the speech of other private participants in the same marketplace. Or, to put the same point another way, Sections 10(a) and 10(c) limit programmers' expressive activity only insofar as—and to precisely the same extent as—they expand that of the operators.[11] Cf. *Midwest Video*, 440 U.S. at 700; Pet. App. 15a.

In those narrow circumstances, the fact that Sections 10(a) and 10(c) distinguish among categories of speech based on content does not pose the same dangers that content-based regulation ordinarily does. Where, as here, a challenged regulation directed at restoring editorial freedom does not restrict the overall ability of the public to engage in free expression, the regulation should be upheld so long as it is reasonable and viewpoint-neutral. See, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2517 (1995) (speech in "limited public" forum); *International Soc'y for Krishna Consciousness*, 112 S. Ct. at 2705-2706 (speech in non-public forums); *Burson* v. *Freeman*, 504 U.S. 191, 214 (1992) (Scalia, J., concurring in the judgment) (same); see also *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 390 (1992) (although viewpoint-based regulations of obscene speech are inherently unlawful, content-based distinctions may be permissible so long as "there is no realistic possibility that official suppression of ideas is afoot"); *id.* at 430 (Stevens, J., concurring in the judgment) ("[W]e have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious."); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 616 (1973).

[11] When analyzing Congress's authority to enact speech-related laws, this Court has found it relevant (though not dispositive) that a given regulation is necessary to mediate the competing speech rights of two sets of private parties. See, *e.g.*, *CBS, Inc.* v. *FCC*, 453 U.S. 367, 396-397 (1981).

Thus, there would be no constitutional impediment to a federal statute authorizing cable operators, at their discretion, to confine programming on access channels to coverage of politics and world events. Likewise, Congress could authorize cable operators not to permit the use of access channels for music or sports shows. In either case, Congress's grant of authority would be reasonable; in neither case would it "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Turner*, 114 S. Ct. at 2458 (quoting *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)), even though the statutes at issue would undeniably distinguish among kinds of speech on the basis of content.

The same is true of Sections 10(a) and 10(c). Those provisions are a reasonable means of permitting cable operators to control what they, as participants in the marketplace of ideas, must transmit to the public. In addition, they are viewpoint-neutral: What they single out for special treatment are not "viewpoints" (indecent speech could relate to a myriad of mutually inconsistent "viewpoints"), but the manner in which those viewpoints are presented. Cf. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 743 n.18 (1978) (plurality opinion) (noting that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content of serious communication" and that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language").

2. Reasonable, viewpoint-neutral regulation in this context is particularly unobjectionable where the subject of the regulation is indecent expression. This Court has invalidated laws that bar all access to indecent material, regardless of whether such measures are necessary to protect the welfare of children or the rights of third parties. See, *e.g.*, *Sable*, 492 U.S. at 126-129. But the Court also has consistently upheld other laws that, technically on the basis of "content," single out indecent speech for

special restrictions.[12] The Court has recognized that such material, whatever its contribution to the marketplace of ideas,[13] can present an almost visceral "assault" on the sensibilities of those who wish to avoid it. *Pacifica*, 438 U.S. at 749.[14] A publisher has a right to display nudity in the centerfold of magazines whose contents readers presumably know in advance, but he does not have the right to display the same nudity on a highway billboard.

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[12] See, *e.g.*, *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675 (1986); *Pacifica*, 438 U.S. at 749-750; *Ginsberg* v. *New York*, 390 U.S. 629 (1968); see also *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991) (upholding enforcement of public indecency law to prohibit expressive nude dancing); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding restrictive zoning scheme directed at adult movie theaters); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (similar); see generally *R.A.V.*, 505 U.S. at 429 (Stevens, J., concurring in the judgment).

[13] Some of this Court's opinions suggest that indecent expression contributes so little to the marketplace of ideas that it merits less constitutional protection than speech closer to the core of the First Amendment. See *Barnes*, 501 U.S. at 566 (plurality opinion) ("nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"); *Bethel*, 478 U.S. at 685; *Pacifica*, 438 U.S. at 743 (plurality opinion) (indecent expression "surely lie[s] at the periphery of First Amendment concern"); *Young*, 427 U.S. at 70-71 (plurality opinion) (because "society's interest in protecting [pornographic] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate[,] * * * the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures"); cf. *FCC* v. *League of Women Voters*, 468 U.S. 364, 383 (1984) (restrictions on core political speech require "especially careful" review).

[14] Petitioners repeatedly and inaccurately characterize what is at issue here as speech that "touches on sex," DAETC Br. 12, the "works of artists such as Courbet or Rodin or Picasso," *id.* at 30, "discussions of relationships between and among the sexes," *id.* at 35, or "the word 'breast,'" Alliance Br. 47. See also DAETC Br. 42, 44. To the contrary, materials that have in fact been found to be indecent under the standard that would apply in this case are aptly characterized as assaulting the viewer or listener. See p. 46 n.25, *infra*.

Sections 10(a) and 10(c) embody that same principle. Unlike the flat indecency ban at issue in *Sable*, those provisions do not interfere with the right to communicate indecent expression through an unbroken chain of consenting private parties. Instead, Sections 10(a) and 10(c) preserve the right of cable operators to avoid becoming purveyors of indecent material on their own systems. The government's interest in preserving that right is no less vital than its corresponding interest in protecting the right of viewers to avoid unwanted exposure to indecent programming. Cf. *Turner*, 114 S. Ct. at 2456 (noting rights of cable operators as disseminators of speech). No one has an absolute right to convey such material to—or through—unwilling third parties.

II. SECTION 10(b), WHICH REQUIRES SUBSCRIBERS TO REQUEST INDECENT LEASED ACCESS PROGRAMMING BEFORE CABLE OPERATORS MAY PROVIDE IT TO THEM, IS CONSTITUTIONAL

Unlike Sections 10(a) and 10(c), which give operators a choice, Section 10(b) requires operators "to place on a single channel all [leased access] indecent programs" and "to block such single channel unless the subscriber requests access to such channel in writing." 47 U.S.C. 532(j)(1)(A) and (B) (Supp. V 1993). The segregation and blocking scheme required by the statute is thus plainly action attributable to the government that is subject to constitutional constraints. In our view, its constitutionality does not depend on the application of strict scrutiny, since a more lenient standard of review applies to regulations designed to protect children from indecent materials on television. Even if it were subject to strict scrutiny, however, it would be constitutional, because the interests in protecting children on which it is based are compelling and because it is narrowly tailored to advance those interests.

A. Section 10(b) Is Not Subject To Strict Scrutiny

1. In *Pacifica*, this Court addressed the FCC's authority to regulate indecent but non-obscene programming broadcast over the airwaves. The Court did not apply strict scrutiny, but a more lenient standard of review. See 438 U.S. at 748. In adopting that approach, the Court did not rely on the scarcity concerns that have supported more lenient treatment of content-based requirements that broadcasters provide programming in the public interest. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969). Instead, the Court rested on two independent considerations that are equally relevant to cable television, which, like broadcasting, conveys highly diversified programming to a mass audience that does not specifically request each program.

First, as this Court noted, radio and television broadcasting "have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748.

That concern applies to regulation of indecency on cable television no less than to its regulation over the airwaves. Television confronts the viewer with a limitless variety of images—some welcome, some not—whether a particular television set is attached to a cable or to an antenna. To be sure, cable subscribers "invite" those images into their homes by connecting their sets to the cable provider's signals. Cf. *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985). That "invitation" is indistinguishable, however, from the affirmative steps any viewer must take to "invite" broadcast signals into the home: *e.g.*, purchasing a television set, attaching an antenna, and adjusting the antenna and the television's tuning knob to pick up local broadcast programming. In this sense, television signals (whether cable or broadcast) never intrude into the home without being "invited" in. What

intrudes, and what *Pacifica* denies the most stringent level of constitutional protection, are the indecent images that confront a viewer as unwanted and unexpected components of a highly diversified programming package. Thus, as the court of appeals observed (Pet. App. 34a), "[a] cable subscriber no more asks for [indecent] programming than did the offended listener in *Pacifica* who turned on his radio."

No matter how indecent images enter the home, of course, any television viewer has the option of turning them off. As *Pacifica* held, however, that option does not affect the level of constitutional scrutiny. "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place." 438 U.S. at 748-749; see also *id.* at 748 (because audience "constantly tun[es] in and out," prior warnings cannot "completely protect the * * * viewer from unexpected program content"); Pet. App. 34a.[15]

This Court also based its decision in *Pacifica* on the additional ground that radio and television are "uniquely accessible to children, even those too young to read." 438 U.S. at 749. Combined with the government's interests in protecting the "well-being of its youth" and in facilitating parental supervision, "[t]he ease with which children may obtain access to broadcast material * * *

[15] Cf. *Sable*, 492 U.S. at 127-128 (invalidating flat ban on dial-a-porn services because, "[u]nlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it"); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (invalidating flat ban on mailing of unsolicited contraceptive advertisements in part because, unlike "uniquely pervasive" broadcast media, "[t]he receipt of mail is far less intrusive and uncontrollable") (emphasis omitted).

amply justif[ies] special treatment of indecent broadcasting." *Id.* at 749-750 (quoting *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968)). Again, this principle is no less applicable to cable television than to broadcast television. From a child's perspective, both the means and the effect of exposure to indecent programming are identical whether the signal reaches the family television set by air or by cable.[16]

Indeed, the application of different standards of review to the regulation of indecency on cable television and on broadcast television could lead to absurd results. A large majority of American households now subscribes to cable television (on which local broadcast stations are among the available channels). *Turner*, 114 S. Ct. at 2454. In most households, there is thus no practical difference, from the viewer's perspective, between programming carried over broadcast channels and programming carried on non-premium cable channels, such as leased access channels. It is constitutionally permissible to prohibit broadcasters from televising indecent material at times when large numbers of unsupervised children are likely to be in the audience. *Pacifica*, 438 U.S. at 748-750; *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (in banc), cert. denied, Nos. 95-509 & 95-520 (Jan. 8, 1996). If regulations governing indecent programming on cable systems are subject to a stricter standard that

[16] Because the *Pacifica* standard applies, petitioners' citation of cases concerning restrictions on the "content" of "controversial"—and non-indecent—speech disseminated through other media is unavailing. Alliance Br. 36-37; see also DAETC Br. 38-39. In case after case, this Court has upheld laws that, on the basis of "content," single out indecent speech for special restrictions narrowly tailored to protect children. See p. 26 n.12, *supra*. Moreover, *Pacifica* rests on the premise that the special characteristics of television and radio programming make indecency conveyed through those media subject to greater regulation than indecency in other media. 438 U.S. at 748. As *Pacifica* holds, such regulation is subject to a less exacting standard of review than speech restrictions that involve neither indecency, children, nor the intrusiveness and accessibility of television.

leads to a different result, then unsupervised children will only have to change the channel to view indecent material. That result would both undermine the broadcast indecency rules and make no sense as a practical matter. Accordingly, regulations governing indecent programming carried on leased access channels should be judged by the same standard applicable to indecent programming carried over broadcast channels. That standard should be the less stringent standard applied by this Court in *Pacifica*.

2. Petitioners err in arguing (Alliance Br. 20-21, 36-37; DAETC Br. 22, 38-39) that this Court determined in *Turner*, 114 S. Ct. at 2457, that strict scrutiny applies to all content-based regulation of cable television, and that that determination is fully applicable in the context of this case.

It has long been clear that, because "a less rigorous standard of First Amendment scrutiny [applies] to broadcast regulation," this Court's cases "permitted more intrusive regulation of broadcast speakers than of speakers in other media." *Turner*, 114 S. Ct. at 2456 (citing *Red Lion Broadcasting Co.* v. *FCC*, *supra*, and *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943)). The "justification for [that] distinct approach to broadcast regulation" was "the unique physical limitations of the broadcast medium"—in particular, "[t]he scarcity of broadcast frequencies" and "the inherent physical limitation on the number of speakers who may use the broadcast medium." *Turner*, 114 S. Ct. at 2456-2457. In *Turner*, this Court declined to extend the principle of more lenient scrutiny to laws imposing affirmative programming requirements on the cable industry, "because cable television does not suffer from the inherent limitations that characterize the broadcast medium." *Id.* at 2457.

The Court's ruling in *Turner* has nothing to do with the separate question whether the *Pacifica* doctrine applies to regulations of indecency on cable television. Unlike the *Red Lion* principle, which applies broadly to regulations compelling programming in the public interest, the *Pacifica*

doctrine applies narrowly to regulations restricting indecent programming. Moreover, the Court's opinion in *Pacifica* rests its conclusions regarding the less rigorous standard of review entirely on the intrusiveness of radio and television and their unique accessibility to children—factors that the Court in *Turner* had no occasion to mention or discuss—rather than the scarcity rationale that the Court in *Turner* did discuss and found inapplicable to cable. Indeed, the Court in *Turner* left room for the continued application of the *Pacifica* approach to cable television, stating that "the First Amendment, *subject only to narrow and well-understood exceptions*, does not countenance governmental control over the content of messages expressed by private individuals." 114 S. Ct. at 2458 (emphasis added). Because the *Pacifica* doctrine provides one of those exceptions, this Court's opinion in *Turner* does not cast doubt on its continued application to cable television.

B. Section 10(b) Is A Constitutional Means Of Realizing The Government's Compelling Interest In Protecting The Well-Being Of Children

1. This Court has often affirmed that the government has a "compelling interest in protecting the physical and psychological well-being of minors," an interest that "extends to shielding minors from the influence of [indecent expression] that is not obscene by adult standards." *Sable*, 492 U.S. at 126 (citing *Ginsberg*, 390 U.S. at 639-640, and *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982)); see also *Sable*, 492 U.S. at 131; *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 683-684 (1986); *Pacifica*, 438 U.S. at 749-750. There are two aspects to that interest, either of which, standing alone, justifies reasonable government regulation of indecent speech. First, the government has an interest in helping parents exercise "authority in their own household to direct the rearing of their children." *Ginsberg*, 390 U.S. at 639; *Action for Children's Television* v. *FCC*, 58 F.3d at 661. Second,

quite apart from facilitating parental supervision, the government has an "independent interest in the well-being of its youth." *Ginsberg*, 390 U.S. at 640; see also *Sable*, 492 U.S. at 126; *Ferber*, 458 U.S. at 756-757; *Pacifica*, 438 U.S. at 749-750; *Prince* v. *Massachusetts*, 321 U.S. 158, 165 (1944).

The government's interest in shielding children from indecency on leased access channels is no less vital than its interest in shielding them from indecent messages conveyed over phone-sex lines, see *Sable*, 492 U.S. at 126, in school assemblies, see *Bethel School Dist.*, 478 U.S. at 683-684, through the airwaves, see *Pacifica*, 438 U.S. at 749-750, or in pornographic magazines, see *Ginsberg*, 390 U.S. at 639-640. In each case, the harm that the government seeks to foreclose—a child's exposure to patently offensive depictions of sexual and excretory activities—is exactly the same. As this Court has recognized, premature and repeated exposure to such material can "seriously damag[e]" a child's development, particularly the development of younger children "on the threshold of awareness of human sexuality." *Bethel School Dist.*, 478 U.S. at 683-684; accord 138 Cong. Rec. S649 (daily ed. Jan. 30, 1992) (statement of Sen. Coats) ("It is no secret that early and sustained exposure to hard core pornography can result in significant physical, psychological, and social damage to a child."); see also *Sable*, 492 U.S. at 126; *Pacifica*, 438 U.S. at 749-750. Notably, petitioners do not contend otherwise. See, *e.g.*, Alliance Br. 37.

2. Section 10(b) is also the least restrictive means of ensuring that children do not watch indecent programming on leased access channels without their parents' consent. Unlike the statute at issue in *Sable*, which denied adults as well as children any opportunity whatsoever to obtain access to indecent "dial-a-porn" messages, see *Sable*, 492 U.S. at 127,[17] Section 10(b) permits adults to watch whatever indecent programs they wish, whenever they wish, on leased access channels.

[17] See also *Bolger*, 463 U.S. at 73 (invalidating federal statute that categorically banned unsolicited mailing of contraceptive advertisements without giving those who wished to read such advertisements any effective way to receive them). As this Court emphasized in each case, both *Sable* and *Bolger* are also distinguishable because dial-a-porn services and mailed advertisements are less intrusive and less accessible to children than television or radio programming. See *Sable*, 492 U.S. at 128; *Bolger*, 463 U.S. at 74.

On the exercise of that right Section 10(b) places a single, easily satisfied, condition: that adults who wish to view such programs tell their cable companies, confidentially, of that choice. As the court of appeals observed, "the difference between the two systems amounts to this: under the 1984 Act, [indecent] material got into the home unless the subscriber locked it out; under the 1992 Act, [such] material does not get into the home unless the subscriber invites it in. Either way the programmers' products are available to those who want to watch them." Pet. App. 37a.

Petitioners contend (Alliance Br. 48 & n.36; DAETC Br. 43-45) that *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), bars the government in any context from requiring individuals to request expressive material as a precondition to receiving it. But *Lamont* involved a law barring the delivery of "communist political propaganda" to persons who had not written the government to request it. Apart from the fact that the statute at issue in *Lamont*, unlike Section 10(b), regulated political speech at the core of the First Amendment, Section 10(b) poses no threat of stigma or intimidation, as the court of appeals recognized. Pet. App. 39a n.23. Section 10(b) simply requires those who wish to view indecent programming on leased access channels to mail a request to their cable operators (not to the government), and federal law requires those operators to keep each such request confidential. See 47 U.S.C. 551 (1988 & Supp. V 1993).[18]

[18] When Time Warner's New York City cable subsidiary recently announced plans to scramble indecent programming on one of its

Petitioners argue that even that negligible "burden" on speech is unconstitutional because, they contend, there are even less speech-restrictive means to the same end. Petitioners claim that the government can fully vindicate its interest in shielding children from indecent programming by relying entirely on the initiative of parents to block such programming themselves, whether through "lockbox" technology or through "reverse central blocking," which would require cable operators to block indecent leased access programming only to those subscribers who specifically ask them to block it.

It is true that lockboxes provide "*one* method for dealing with obscene or indecent programming," H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984) (emphasis added), and so would a scheme of "reverse central blocking." But subscriber-initiated measures alone cannot solve some of the most important problems posed by indecent programming. To the contrary, as Congress recognized in passing the 1992 Cable Act, Section 10(b) constitutes the only effective means of advancing both the government's interest in facilitating parental supervision and its separate interest in ensuring that indecent programming will not harm any child whose parents have not specifically chosen to allow such programming into the home. See *Ginsberg*, 390 U.S. at 639-640.

a. In the absence of Section 10(b), subscriber-initiated blocking measures would not protect children from indecent programming unless and until their parents had taken several affirmative steps. Parents would have to discover that leased access channels convey indecent programming into their homes even though they never specifically ordered it; they would have to learn about—and focus on—their option to block such programming; and

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leased access channels, more than 50,000 subscribers responded in writing to request access to the scrambled channel. See *Goldstein* v. *Manhattan Cable Television, Inc.*, No. 90 Civ. 4750 (LBS) (S.D.N.Y. Sept. 20, 1995), slip op. 15.

they would have to take the initiative to ensure that such programming is in fact blocked. In the case of lockboxes, parents would have to discover that such devices exist; find out that their cable operators offer them for sale; spend the time and money to buy one; learn how to program the lockbox to block undesired programs; and, finally, exercise sufficient vigilance to ensure that they have, indeed, locked out whatever indecent programming they do not wish their children to view.

As Congress recognized, many parents, even those who would not affirmatively choose to permit indecent programming on their family televisions, would fail to take some or all of those steps. That fact reveals both the ineffectiveness of relying entirely on subscriber-initiated measures to protect children from viewing indecent programming and, at the same time, the principal reason why commercial providers of indecent programming would prefer to place the burden of taking action on parents who wish to keep indecency out of their homes. Given the choice, some parents would affirmatively decide to let their children view indecent programming on television. Many would affirmatively choose to keep their children from viewing such programming. Between those two poles, however, are the innumerable parents who—through absence, distraction, indifference, inertia, or insufficient information—would make no affirmative choice at all.

Petitioners' challenge to Section 10(b) rests on the premise that Congress has no valid interest in protecting the children of this latter group of parents from unimpeded access to patently offensive televised depictions of sexual and excretory functions or organs. That premise, however, is irreconcilable with this Court's decisions. The government's "compelling" interest in shielding children from indecency, *Sable*, 492 U.S. at 126, extends beyond facilitation of parental supervision to the government's own "independent interest in the well-being of its youth." *Ginsberg*, 390 U.S. at 640. As this Court observed in upholding

a prohibition on the sale of pornography to minors, "[w]hile the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them." *Ibid.*

Significantly, Section 10(b) does not place that interest in conflict with the right of parents to bring up their children however they see fit, nor, again, does it keep those parents themselves from viewing indecent programming on leased access channels. Parents who wish to expose their children to televised indecency remain free to do just that, so long as they take the time to mail a simple request to their cable companies. Instead, among its other purposes, Section 10(b) asserts the government's interest in the well-being of those children whose parents have *failed* to decide, one way or the other, whether indecent leased access programs should continue to appear on the family television. And no provision could advance *that* interest in a less speech-restrictive manner than Section 10(b). Indeed, the government cannot advance that interest at all without establishing a default rule that, absent a clear parental choice to the contrary, children will not have access to indecent programming.

b. Even if the government's interest in regulating televised indecency were limited to the facilitation of parental supervision, Section 10(b) is the least restrictive means of achieving that end as well. The provision reflects, among other things, a reasonable presumption that many—if not most—parents, if they had to choose, would wish to have available the most effective means of keeping their children from viewing indecent programming.

Section 10(b) also eliminates the possibility that children will have the opportunity to become regular viewers of indecent programming on leased access channels long before their parents could find out and take remedial

action. Indeed, that same concern led Congress and the Commission to determine that they could not adequately protect children from exposure to "dial-a-porn" services simply by requiring telephone companies to honor a parent's request to block access to indecent prerecorded messages from the parent's home telephone. Both the Second and the Ninth Circuits have upheld that determination on the ground that "[a] parent often does not request central office blocking until after the minor has consummated a call and the parent has discovered it on the telephone bill. * * * [F]rom a practical standpoint, central blocking is invoked only after the minor's physical and psychological well-being have been damaged." *Information Providers' Coalition*, 928 F.2d at 873; accord *Dial Information Servs. Corp.* v. *Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991) ("[H]alf of the residential households in New York are not aware of either the availability of dial-a-porn or of blocking. * * * It always is more effective to lock the barn *before* the horse is stolen."), cert. denied, 502 U.S. 1072 (1992). In adopting its implementing regulations for Section 10(b), the Commission recognized that a similar problem would undermine the effectiveness of relying solely on lockboxes or other subscriber-initiated measures to shield children from indecency on leased access channels. See Pet. App. 134a-137a.[19]

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[19] As the court of appeals and the Commission also observed, the very nature of lockbox technology poses problems of implementation that seriously reduce its effectiveness as a means of parental supervision. Because leased access programming "may come from a wide variety of independent sources, with no single editor controlling their selection and presentation," parents forced to rely entirely on a lockbox approach would be "required to manually install, activate, and deactivate" their lockboxes each time they sought to keep indecent programming out of their homes, and their attempts "would not always be successful." Pet. App. 136a-137a; see *id.* at 34a-35a. The alternative would be to permanently block out the separate channel (which may have other, non-indecent programming

Just as important, a regulatory scheme that relied entirely on the initiative of parents to block indecent leased access programs from their own homes would do nothing at all to help parents keep their children from viewing such programs in *other* people's homes. To help parents meet that concern, Section 10(b) offers the least speech-restrictive solution: It ensures that indecent leased access programing will appear only in the homes of those who affirmatively request it. To be sure, that approach does not eliminate the possibility that, without their parents' knowledge, some children will view indecent programming in the homes of those who *do* request such programming. But that risk reflects the inevitable balance that Congress had to strike between the right of parents to insulate their children from indecent programming and the opposing right of other adults to choose to view such programming.

Alliance, though not DAETC, further contends (Br. 38) that a "safe harbor" restriction, under which indecent programming could be shown only during the late-night hours, would be less speech-restrictive than Section 10(b)'s segregation and blocking provisions. In important respects, however, a safe-harbor scheme would be *more* restrictive than Section 10(b), since segregation and blocking, unlike a chronological safe harbor, permits willing subscribers to receive indecent programming at all hours of the day.

This is not to say, of course, that a blocking scheme would be constitutionally required for every medium, since blocking is technologically feasible in some media but not in others.[20] Where technology permits a choice between

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on it) and forgo the programming on that channel "entirely." *Id.* at 137a; see *id.* at 35a.

[20] In broadcasting, for example, because it is technologically impracticable (at least at present) to implement a central office

mandatory time-of-day restrictions and a technique that permits 24-hour access, however, the First Amendment surely permits Congress to pick the latter.[21]

III. SECTION 10 IS NOT UNCONSTITUTIONALLY UNDERINCLUSIVE

Petitioners claim that, whether or not Section 10 is an effective means of shielding children from indecent programming, it is impermissibly "underinclusive," because it applies only to indecent programming on access channels and not to such programming on other cable channels. See Alliance Br. 41-43; see also DAETC Br. 47-48. That claim is without merit.

First, Sections 10(a) and 10(c) eliminate, rather than create, a distinction among cable channels. The 1984

"blocking" scheme to screen indecent programming on existing television sets and radios, Congress has employed a safe-harbor approach. See *Action for Children's Television*, 58 F.3d 654 (D.C. Cir. 1995) (in banc), cert. denied, Nos. 95-509 & 95-520 (Jan. 8, 1996).

[21] Nor does Section 10(b) impose a "prior restraint" on speech, as petitioner Alliance contends (Br. 47-48). The provision does not prevent the carriage of indecent leased access programming; it just requires that a cable subscriber submit a written request to the operator before gaining access to such programming. Because any subscriber can make such a request, Section 10(b) does not "restrain" indecent speech at all. See *Dial Information Servs.*, 938 F.2d at 1543; *Information Providers' Coalition*, 928 F.2d at 878. Alliance also complains (Br. 48) that cable operators have 30 days in which to comply with requests for access to blocked programming on leased access channels. See 47 C.F.R. 76.701(c). The 30-day period, however, is the *maximum* allowable under the Commission's rules, and in many cases access will be made available in less time. In any event, that fairly brief waiting period is necessary to ensure that a cable operator will be able to verify that the requestor is at least 18 years old. See generally Pet. App. 164a. And if the regulation permits too long a period, the appropriate remedy is to shorten the period specified in the regulation, not to invalidate the statute.

Cable Act generally barred cable operators from exercising "any editorial controls" over programming on access channels but imposed no such restriction on other channels. See 47 U.S.C. 531(e), 532(c)(2) (1988).[22] Sections 10(a) and 10(c) restore operators' editorial control over indecent programming on access channels by ensuring that cable operators have the discretion to prohibit such programming if they so choose. See 47 U.S.C. 531 note, 532(h) (Supp. V 1993).

Second, Section 10(b), which requires cable operators to segregate and block any indecent programming that they permit on leased access channels, draws a reasonable distinction between those channels and other channels. Congress found that leased access channels—which federal law compels a cable operator to transmit to subscribers as part of its basic service—presented the most severe aspect of the problem of unrequested indecent programming on cable television. Pet. App. 40a-41a. Most other indecent programming appears either on "premium" channels (such as HBO or the Playboy Channel) or as pay-per-view offerings, neither of which subscribers receive unless and until they make a specific request. See *id.* at 138a n.20. Nothing in the First Amendment prevents Congress from reasonably deciding to impose the segregation and blocking requirements of Section 10(b) only where they are most needed. See *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2707 (1993). Under the alternative view, the First Amendment would embody a constitutional requirement that government authorities, when enacting or implement-

[22] The only exception is that cable operators must carry local broadcast stations, whose programming they cannot control. See generally 47 U.S.C. 534, 535 (Supp. V 1993); *Turner Broadcasting Sys., Inc.* v. *FCC*, *supra*. Under a separate statutory scheme, however, Congress has limited indecency on broadcast stations to the late evening hours. See generally *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (in banc), cert. denied, Nos. 95-509 & 95-520 (Jan. 8, 1996).

ing otherwise permissible speech regulations, err on the side of restricting as much speech as possible.

IV. SECTION 10 IS NOT UNCONSTITUTIONALLY VAGUE

Section 10 is not rendered unconstitutionally vague because it applies to "indecent" programming, as petitioners contend. See Alliance Br. 43-47; DAETC Br. 25-32.

Under the Commission's traditional definition of indecency, which Section 10 incorporates, programming is indecent only if it "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." 47 C.F.R. 76.701(g); see also 47 C.F.R. 76.702. This Court has declined invitations to find that definition unconstitutionally vague,[23] as have the several courts of appeals that have considered the issue. See *Action for Children's Television*, 58 F.3d at 659; *Information Providers' Coalition*, 928 F.2d at 874-875; *Dial Information Servs.*, 938 F.2d at 1540-1541.

Petitioners' position is also in serious tension with this Court's decisions rejecting vagueness challenges to statutes prohibiting obscenity. In *Fort Wayne Books, Inc.* v.

[23] The definition was the subject of a vagueness challenge in *Pacifica* itself, see American Broadcasting Cos., Inc., et al., Amicus Br. 33-39 (No. 77-528), but the Court upheld the Commission's authority to restrict a specific broadcast without expressing concern about the determinacy of the Commission's definition—and, indeed, after quoting portions of that definition with apparent approval. See 438 U.S. at 739, 741.

Likewise, *Sable* presented a challenge to the Commission's definition as applied to "dial-a-porn" telephone messages. See Brief for Appellant/Cross-Appellee Sable Communications of California, Inc., at 32-37 (Nos. 88-515 & 88-525). In striking down a flat congressional ban on all indecent prerecorded messages on "dial-a-porn" lines, this Court expressed no concern that any aspect of the Commission's generic definition of indecency would preclude more narrowly tailored efforts to regulate such messages. See 492 U.S. at 128.

Indiana, 489 U.S. 46 (1989), for example, the Court denied a vagueness challenge to an Indiana statute that broadly deemed any book or film "obscene" if, among other things, it "depicts or describes, in a patently offensive way, sexual conduct." See *id.* at 57-58 & n.6. That portion of the statute, which is based on the obscenity formulation announced in *Miller* v. *California*, 413 U.S. 15, 24 (1973), is virtually indistinguishable from the Commission's generic definition of indecency. Because the former is sufficiently determinate to withstand a vagueness objection, the latter is as well.[24]

Petitioners seek to avoid that conclusion by observing that no work is obscene under *Miller* unless it meets two additional criteria: (1) "the average person, applying contemporary community standards," must find that the work, "taken as a whole, appeals to the prurient interest," and (2) the work, taken as a whole, must "lack[] serious literary, artistic, political, or scientific value." 413 U.S. at 24. Yet each of the three elements of this Court's obscenity definition is conceptually independent of the other two. It is thus illogical to claim, as petitioners do, that the legal standard embodied in one of those elements ("patently offensive" depictions of "sexual conduct," see *ibid.*) can be unconstitutionally vague where indecency regulation is concerned, but permissible in an anti-obscenity statute (which, in contrast to the situation here, typically involves the imposition of criminal sanctions).

Petitioners also cite a provision of Section 10(a) entitling cable operators to bar material that they "reasonably believe[]" is indecent. See, *e.g.*, Alliance Br. 45-46; DAETC Br. 31. Apart from the state action issues raised by any challenge to Section 10(a), see pp. 13-23, *supra*, the "reasonable belief" standard, far from expanding or blurring the scope of what is covered under Section 10,

[24] Although petitioners appear to suggest otherwise, see Alliance Br. 44-45; DAETC Br. 32, this Court's precedents permit federal regulation of obscenity on a national scale. See *Sable*, 492 U.S. at 125; *Hamling* v. *United States*, 418 U.S. 87, 104-105 (1974).

simply ensures that no operator may exercise editorial control over disputed programming unless its determination of indecency is objectively "reasonable." In any event, the federal courts will resolve disputes between leased access programmers and cable operators concerning what constitutes "indecent programming" for purposes of Section 10(a), see Pet. App. 144a-145a, and the Commission will resolve such disputes for purposes of Section 10(b), see *id.* at 167a-168a & n.55; see also Alliance Br. 14-15. Similarly, PEG programmers may appeal to local franchise authorities to resolve disputes with cable operators about whether given programming is indecent for purposes of Section 10(c). See Pet. App. 194a. Petitioners suggest no basis for claiming that either the courts, the FCC, or local authorities would be unable to resolve such disputes. In any event, such speculation, without any factual or historical basis, cannot support a vagueness challenge to a regulation of indecent expression. See *Pacifica*, 438 U.S. at 743 (plurality opinion); *id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment).

2. The Court's decisions in this area embody a judgment that the social necessity of subjecting indecency and obscenity to special regulation outweighs whatever unavoidable indeterminacy inheres in any definition of those two categories of expression. At bottom, petitioners ask this Court to disavow that judgment and forbid any governmental effort to regulate indecency in any medium. Petitioners offer no alternative definition of indecency that would avoid the supposed vagueness problems that they attribute to the traditional definition. Instead, they complain about the supposed difficulty of any effort to distinguish indecent from non-indecent speech.

Revealingly, however, petitioners confine almost all of their discussion of supposedly close cases to hypothetical controversies, see, *e.g.*, DAETC Br. 30, 35, and make no serious effort to show that the FCC has, in fact,

erroneously designated material (in any medium) as "indecent."[25] Nor do petitioners cite a single case in which any court has reversed an FCC finding of indecency. That is no accident, for the Commission has consistently taken pains, in close cases, to err on the side of determining that material is not legally indecent. See *Action for Children's Television* v. *FCC*, 59 F.3d 1249, 1261 (D.C. Cir. 1995) ("so far as this record shows the FCC is not enforcing the statutory ban on indecency against material that is not indecent"), cert. denied, No. 95-620 (Jan. 16, 1996).

The FCC's long-standing caution in this area led the Court in *Pacifica* to deny claims that the Commission's treatment of indecency would chill protected speech. See 438 U.S. at 743 (plurality opinion); *id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment). Where, as here, a vagueness challenge to indecency regulations is speculative—and, for that matter, historically baseless—the proper course is "not * * * [to] pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable," but rather to "deal with those problems if and when they arise." *Id.* at 743 (plurality opinion); *id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment).

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[25] In a footnote, petitioner DAETC cites several FCC indecency decisions with apparent but unexplained disapproval. See DAETC Br. 34 n.47. Petitioner's terseness is understandable, for the cited material contains explicit and graphic descriptions of sexual activities. See, *e.g.*, *In re Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 934 (1987), modifying *In re Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987); *In re KSD-FM*, Notice of Apparent Liability, 6 FCC Rcd 3689, 3690 (1990). See also, *e.g.*, *In re Regents of Univ. of California*, 2 FCC Rcd 2703 (1987); *In re Infinity Broadcasting Corp.*, 2 FCC Rcd 2705, 2706 (1987).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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